Supreme Court, U.S.
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No. 02-___

IN THE

Supreme Court of the United States

Keith Shwayder,

Petitioner,

v.

United States of America.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether and to what extent the presumption of prejudice from conflicting representation adopted in *Cuyler* v. *Sullivan*, 446 U.S. 335 (1980), applies in cases of successive representation, a question this Court left open in *Mickens* v. *Taylor*, 535 U.S. 162 (2002)?

2. When defense counsel in a criminal prosecution operates under a conflict of interest, what legal standard governs whether the conflict has an "adverse effect" under *Sullivan*, a question on which the circuits have developed three irreconcilable tests?

3. When defense counsel in a criminal prosecution must vigorously attack a former client from a closely related matter in order to represent a present client effectively, what legal standard governs whether the conflict had an "adverse effect" on the representation for purposes of *Sullivan*?

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties listed in the caption, Michael G. Swan and Kevin Orton were defendants-appellants in the proceedings below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Keith Shwayder respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. 1a-21a) is published at 312 F.3d 1109. The opinion of the Ninth Circuit denying rehearing and rehearing en banc and amending the panel opinion (Pet. App. 26a-28a) is published at 320 F.3d 889. The district court's orders denying petitioner's motion for a new trial and his motion for reconsideration of his motion for a new trial (Pet. App. 22a-25a) are unpublished.

RELEVANT CONSTITUTIONAL PROVISION

The Sixth Amendment to the U.S. Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence."

JURISDICTION

The Ninth Circuit entered its opinion on December 5, 2002. On February 24, 2003, the Ninth Circuit entered its order denying rehearing and rehearing en banc and amending the panel opinion. On May 15, 2003, Justice O'Connor extended the time to file a petition for certiorari to and including June 24, 2003. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

STATEMENT

This case presents fundamental and unresolved questions of law relating to the Sixth Amendment right to counsel upon which the courts of appeals are in conflict. This Court held in *Cuyler* v. *Sullivan*, 446 U.S. 335, 348-49 (1980), that a defendant is presumptively prejudiced if his counsel labored under an "actual conflict of interest" that had an "adverse

effect" – in the form of "an actual lapse in representation" – on his attorney's performance. The *Sullivan* presumption reflects this Court's "refus[al] 'to indulge in nice calculations as to the amount of prejudice' attributable to the conflict. The conflict itself demonstrated a denial of the 'right to have the effective assistance of counsel.'" *Sullivan*, 446 U.S. at 349 (quoting *Glasser* v. *United States*, 315 U.S. 60, 76 (1942)). See also *Rubin* v. *Gee*, 292 F.3d 396, 402 (CA4) (Wilkinson, C.J.), cert. denied, 123 S. Ct. 637 (2002) ("This presumption of prejudice arises because 'it is difficult to measure the precise effect on the defense' when representation is 'corrupted by conflicting interests.'" (citations omitted)).

Sullivan was a case of concurrent representation, not "successive" representation, as when counsel is forced to examine a former client who appears adversely to a current client. In *Mickens* v. *Taylor*, 535 U.S. 162, 122 S. Ct. 1237, 1245-46 (2002), this Court expressly avoided addressing "the need for the *Sullivan* prophylaxis in cases of successive representation. Whether *Sullivan* should be extended to such cases remains, as far as the jurisprudence of this Court is concerned, an open question." This case presents the opportunity for the Court to resolve the issue it left open in *Sullivan*. The Court should take this opportunity to hold that the presumption of prejudice applies in cases of successive representation when (as in this case) the current and former matters are closely related.

This Court has also thus far left unresolved the critical question of what constitutes an "adverse effect" sufficient to trigger the *Sullivan* presumption. "[T]here is no Supreme Court precedent, but a split in circuit authority, regarding the appropriate conflict of interest standard." *Quinones* v. *Miller*, No. 01 Civ 10752, 2003 U.S. Dist. LEXIS 9176, at *122 (S.D.N.Y. June 3, 2003) (report and recommendation of magistrate judge).

An entrenched three-way conflict exists. Two courts of appeals – including the Ninth Circuit in this case – refuse to

find a violation of the Sixth Amendment as long as counsel provided "the type of representation" as he would have absent the conflict. Indeed, the Ninth Circuit requires that "an adverse effect in the *Sullivan* sense must be one that *significantly worsens* counsel's representation" (*United States* v. *Mett*, 65 F.3d 1531, 1535-36 (1995) (emphasis added)), which is a "*substantial hurdle*" to a claim under the Sixth Amendment (*Maiden* v. *Bunnell*, 35 F.3d 477, 481 (1994) (emphasis added)). By contrast, six circuits find it determinative whether the scope of the attorney's representation was in some respect constrained as a result of the conflict. These courts find an adverse effect, and thus a violation of the Sixth Amendment, if the defendant can "demonstrate that some plausible alternative defense strategy or tactic might have been pursued, and that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests." *E.g.*, *United States* v. *Malpiedi*, 62 F.3d 465, 469 (CA2 1995). Two further circuits take a middle ground, adding the requirement that the alternative strategy be "reasonable." *E.g.*, *Freund* v. *Butterworth*, 165 F.3d 839, 860 (CA11), cert. denied, 528 U.S. 817 (1999).

The disagreement among the courts of appeals has particular consequence for the recurring factual scenario of this case: in a criminal prosecution, an attorney's former client from a closely related matter appears as a government witness adverse to a present client. In these circumstances, the attorney's duties of loyalty and confidentiality to the former client *forbid* remaining in the case despite the conflict. See A.B.A. Model Rule of Prof. Conduct 1.9. But attorneys nonetheless regularly continue notwithstanding their clear ethical obligations to the contrary. The Ninth Circuit in this case found that petitioner's counsel had a plain conflict of interest when a former client pleaded guilty and appeared as the principal government witness against petitioner. But the court of appeals, applying the minority standard for finding an "adverse effect" on the representation, found no Sixth

Amendment violation. Other courts of appeals, by contrast, not only recognize that ethical constraints make it exceedingly unlikely that the attorney could provide effective representation in these circumstances but also refuse to engage in the Ninth Circuit's *post hoc* rationalization of the trial proceedings. See, *e.g.*, *Malpiedi*, 62 F.3d at 468-69 (holding that attorney's conflict of interest arising from prior representation of key prosecution witness had adverse effect on his representation of defendant, notwithstanding district court's findings that, *inter alia*, attorney's cross-examination of witness was "very effective").

Certiorari accordingly should be granted.

1. Petitioner Keith Shwayder was the founder and developer of Teletek, a NASDAQ-listed company that (at the time relevant to these proceedings) installed cables for telephone systems and computer networks. More than a decade after founding Teletek and expanding the business, petitioner in 1991 was approached by an individual named Michael Swan, who held a controlling share in another company, United Payphone ("UPAY"). Swan proposed a Teletek-UPAY merger. Unbeknownst to petitioner, Swan was engaged in a scheme of bribing stockbrokers to sell UPAY stock to their clients in order to raise the stock price of UPAY. He sought the merger to take advantage of Teletek's NASDAQ listing.

Petitioner agreed to the merger and essentially stepped aside. Swan promptly succeeded petitioner as CEO and chairman of the board of directors. Swan moved Teletek's headquarters from Denver (where petitioner lived) to Las Vegas and changed the company's counsel and also its accountants. Less than eight months after the merger, petitioner resigned entirely from Teletek.

Before, during, and after petitioner's brief tenure at the post-merger Teletek, Swan continued bribing stockbrokers to sell stock, using methods that included cash payments to the brokers and the issuance of stock in return for phantom

consulting services. Petitioner's position has always been that he was unaware of the bribery scheme.

Swan's bribery later came under suspicion. A Las Vegas grand jury investigating bribery raised allegations that Swan had testified falsely in an SEC deposition regarding bribes to stockbrokers. Swan was also the subject of a lawsuit alleging bribery. Bribery allegations were furthermore raised against Swan in criminal proceedings against a California stockbroker. From October 1994 to March 1995, Swan was represented in these matters by an attorney named John Schlie (who would later take center stage in the proceedings). Swan repeatedly insisted to Schlie that he had never bribed stockbrokers.

As the grand jury investigation relating to Swan's conduct continued, petitioner in August 1996 sought to retain Schlie to represent him with respect to the investigation. Schlie sought a waiver of the resulting conflict of interest from Swan. Schlie's contemporaneous notes indicate that Swan authorized him to speak with petitioner only "as long as I don't have to breach [Swan's] atty/client privilege." The waiver therefore provided that Swan "did *not* * * * authorize [Schlie] to disclose any information subject to [his] attorney-client privilege" (emphasis in original).[1]

2. Swan and petitioner – along with Swan's wife and two others – were subsequently indicted on charges arising out of the same grand jury investigation in which Schlie had represented Swan. Swan's wife and one of the men pleaded guilty before trial. But Swan did not.

Schlie continued to serve as petitioner's counsel. In February 1998, the three remaining defendants – Swan,

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[1] Schlie also sought a conflict waiver from petitioner. For a variety of reasons, the government has explicitly abandoned reliance on the waiver. See Gov't C.A. Br. 38. The court of appeals also found the waiver utterly inadequate. Pet. App. 11a-12a.

petitioner, and Kevin Orton – entered into a joint defense agreement. The grand jury subsequently returned a second superseding indictment as to all three defendants, alleging that they had inflated the value of shares in UPAY and Teletek. The specific counts of the indictment charged them with RICO, RICO conspiracy, securities fraud, conspiracy to commit securities fraud, wire fraud, and money laundering.

Petitioner was jointly tried with Swan and Orton in a two-month trial beginning in October 1999. As the case went to trial, the government's case against petitioner was weak. Petitioner had created and developed Teletek as a reputable business for more than a decade. He had a reputation as a law-abiding and respected businessman, as reflected in character witnesses who testified at trial. The government relied principally on a disgruntled former employee who was discredited in a withering cross-examination. The other witness was another person implicated in Swan's scheme and who transparently sought to deflect blame away from himself.

From the onset of the trial, the logical strategy for Schlie to pursue on petitioner's behalf in seeking an acquittal was therefore to place the blame for the bribery scheme on Swan and to portray petitioner as yet another victim of Swan's scheme. In particular, pre-trial discovery and the evidence presented at trial demonstrated that Swan had committed multiple acts of bribery over several years; that petitioner's tenure at Teletek had overlapped Swan's by less than eight months; that petitioner had not previously known Swan before the Teletek merger and had no relation with him after leaving Teletek; and that the evidence of petitioner's knowledge of Swan's bribery scheme was tenuous. But that strategy would have placed Schlie in direct conflict with Swan, both as to Schlie's duty of loyalty and also as to his duty to retain confidences relating to the grand jury proceedings.

During the first part of the trial, Schlie's defense of petitioner was therefore a joint defense. Not only did Schlie fail to make any effort to place the blame for the bribery scheme on Swan, but – during the first several days of the trial – it would in fact have been difficult for an observer to discern that Schlie represented petitioner, rather than Swan. Thus, his opening statement focused in large part on a general description of the securities industry, without any significant discussion of the defendants' individual roles in the conduct at issue. Schlie made virtually no effort to distance petitioner from Swan's conduct, including by contrasting the integrity of petitioner with that of Swan, and indeed never hinted that Swan had done anything wrong. Moreover, his entire introduction of petitioner consisted of two sentences: "Could you stand up, Mr. Shwayder, please? Mr. Shwayder is a businessman from Denver, Colorado."

Midway through the trial, however – well after opening statements and the presentation of an array of evidence – Swan recognized that the evidence against him personally was overwhelming. He pleaded guilty to all of the charges against him and became the principal witness against petitioner in exchange for a reduced sentence. Swan made extremely damaging claims against petitioner regarding the pivotal issue in the case – *viz.*, whether petitioner knew that Swan had bribed brokers to promote and sell Teletek stock. Indeed, in some instances, Swan was the sole source of evidence for the prosecution.

This development sharpened further the already substantial conflict faced by Schlie between his duties to petitioner as his present client and Swan as his former client. Indeed, it raised the prospect that Schlie would have to appear as a witness in the proceedings to describe Swan's previous false statements to him, a result that would have required Schlie to disqualify himself and return the substantial fee he had received from petitioner.

During his cross-examination of Swan and his closing argument, Schlie failed to attack Swan's credibility vigorously. Specifically, Schlie did not make any substantial effort to impeach Swan's credibility as a witness by attempting to establish not only that Swan had lied to petitioner and others in the past, but also that Swan was lying to the jury to win a reduced sentence under Sentencing Guideline § 5K1.1. Moreover, Schlie never sought to elicit the fact that, while he was representing Swan, Swan had also lied to him about his efforts to bribe brokers to promote Teletek stock. The jury returned guilty verdicts, as well as forfeiture verdicts, as to most of the charges against Orton and petitioner on December 23, 1999.

3. Represented by new counsel post-trial, petitioner moved for a new trial based on Schlie's conflict of interest arising from his representation of Swan and petitioner. The district court denied the motion. Pet. App. 22a-23a.

On March 7, 2001, the district court sentenced petitioner to eighty-seven months in prison, ordered petitioner to pay $1.5 million in restitution, and entered a final order of forfeiture in the amount of $414,334. But because the court found that the effect of Schlie's conflict of interest presented a substantial question, the trial court stayed petitioner's sentence pending appeal.

4. On appeal, petitioner argued that Schlie's prior representation of Swan on matters substantially related to petitioner's case amounted to a conflict of interest that sufficiently interfered with the representation, violating petitioner's Sixth Amendment right to conflict-free counsel. Petitioner urged the court of appeals to adopt the Second and Tenth Circuits' holdings that a prior conflicting representation has an adverse effect on defense counsel's performance "if a specific and seemingly valid or genuine alternative strategy or tactic was available to defense counsel, but it was inherently in conflict with his duties to others or to his own personal interests." Pet'r C.A. Br. 36 (quoting *Church* v. *Sullivan*, 942

F.2d 1501, 1512 (CA10 1991), and citing *Amiel* v. *United States*, 209 F.3d 195, 199 (CA2 2000)). By contrast, the government urged that the case was controlled by Ninth Circuit precedent holding that the "'adverse effect prong' does not require proof of prejudice, but 'remains a substantial hurdle.'" Gov't C.A. Br. 34 (quoting *United States* v. *Mett*, 65 F.3d 1531 (1995), cert. denied, 519 U.S. 870 (1996)).

The court of appeals agreed with petitioner that Schlie's representation of Swan and petitioner amounted to a flat conflict of interest:

> Schlie represented Swan in matters that directly concerned bribing stockbrokers to sell Teletek stock. From the beginning of this litigation, [petitioner] had an interest in laying the blame on Swan and portraying himself as the victim. The conflict between the two alleged coconspirators became greater when Swan agreed to plead guilty and testify against [petitioner] for the prosecution. By shifting the blame to Swan through cross-examination concerning matters on which he had previously represented him, Schlie could have breached his duty of loyalty to Swan – or at least could have feared that he would appear to do so and therefore avoided certain areas of inquiry.

Pet. App. 13a (citation omitted).

The court of appeals also recognized the substantial prospect that such a conflict would have an adverse effect on Schlie's representation of petitioner. The conflict implicated both Schlie's duty to keep confidences and his distinct duty to remain loyal. Regarding the former, "[o]ne of the risks created by successive representation is that the attorney who has obtained privileged information from the former client may fail to conduct a rigorous cross-examination [of that client] for fear of misusing that confidential information. The potential for conflict is particularly acute when the two clients are co-defendants who allege different levels of culpability."

Pet. App. 12a-13a (citation omitted) (alteration in original). Regarding the latter, "Swan had yet to be sentenced. Effective testimony could have affected his sentence through a substantial assistance departure. Conversely, if [Schlie established that] Swan lied on the stand, an obstruction of justice enhancement was a possibility." *Id.* 13a n.4.

Yet the Ninth Circuit refused to find that this palpable conflict had an "adverse effect" on Schlie's representation of petitioner. The court held that petitioner was required to establish that "counsel *was influenced* in his *basic* strategic decisions by the interests [of the former client], as where the conflict *prevents* an attorney * * * from arguing the relative involvement and culpability of his clients in order to minimize the culpability of one by emphasizing the other." Pet. App. 13a (citation omitted) (alteration in original) (emphasis added).

Schlie unquestionably did not adopt a consistent strategy, beginning with the opening statement, of arguing and proving to the jury that petitioner had not participated in Swan's extensive scheme, which pre- and post-dated petitioner's relationship with Swan. Yet the court of appeals deemed it sufficient that in the opening statement, Schlie stated "that the trial would come down to knowledge and that the jurors would have to make their decisions on each individual defendant independently." Pet. App. 15a.

Schlie also unquestionably made little effort to impeach Swan's testimony, including by raising Swan's own false statements to Schlie. Yet the court of appeals deemed it sufficient that Schlie examined *other* "witnesses with questions directed at establishing that Swan alone was to blame." Pet. App. 15a. The only exceptions were that Swan acknowledged on Schlie's examination that 'Swan never told Shwayder that he was paying off stockbrokers" and that he was receiving a reduced sentence for testifying. *Id.* The Ninth Circuit also found it significant that Schlie conceivably could have evaded in part his duty to maintain Swan's

confidences by relying on non-confidential materials, such as "the indictment, the trial testimony, and the evidence provided to the defense on discovery." *Id.* 16a.

Finally, the court of appeals refused to assign any weight to the fact that Schlie utterly failed to attack Swan's credibility through Swan's own previous lies to Schlie. "There was one fact not available from an independent source – that Swan had lied to Schlie during his prior representation. It is impossible, however, to characterize Schlie's failure to mention this fact as an adverse effect caused by his former representation of Swan. Schlie's communications with Swan were protected by the attorney-client privilege, so they could not have been elicited by any other lawyer either." Pet. App. 16a. Furthermore, Schlie stated in closing argument that "Swan had lied to everyone else, specifically mentioning 'his [other] lawyer,' as well as Shwayder." *Id.*[2]

5. Petitioner moved for a stay of the mandate, highlighting the conflict among the courts of appeals regarding the adverse effect that must be shown from counsel's conflict of interest to establish a violation of the Sixth Amendment. The Ninth Circuit granted the motion and this petition followed.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for two reasons. *First*, this case presents the opportunity to decide an important and recurring question left open by *Mickens* v. *Taylor*, 535 U.S. 162 (2002): whether and to what extent the presumption of prejudice established by *Cuyler* v. *Sullivan*, 446 U.S. 335 (1980), applies in cases of successive, rather than multiple, representation. The Court should hold that *Sullivan* applies

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[2] The court of appeals inaccurately attempted to buttress its holding by stating that Schlie "emphasized" Swan's previous lies and "emphasized" that each defendant's guilt must be judged independently. Each of those statements is actually just a passing reference in the closing and opening arguments, respectively.

when (as in this case) the successive representation is closely related to the prior representation. *Second*, this case presents the opportunity to resolve the entrenched circuit split over the standard for finding an "adverse effect" under *Sullivan*. Such a conflict on this basic question of federal constitutional law is intolerable. The Court should adopt the majority view in the circuits that an adverse effect is established when a conflict of interest impedes counsel from pursuing an otherwise available strategy or tactic. Under that standard, petitioner's conviction must be reversed.

I. This Case Presents The Court With The Opportunity To Decide The Important And Recurring Question Whether And To What Extent *Sullivan*'s Presumption Of Prejudice Applies To Cases Of Successive Representation.

In *Cuyler* v. *Sullivan*, 446 U.S. 335 (1980), this Court held that prejudice will be presumed for a defendant alleging a violation of the Sixth Amendment right to counsel if that defendant can demonstrate that an actual conflict of interest had an adverse effect – in the form of "an actual lapse in representation" – on his attorney's performance. *Sullivan* was a case of multiple concurrent representation, not successive representation. In *Mickens* v. *Taylor*, 535 U.S. 162, 122 S. Ct. 1237, 1245-46 (2002), this Court expressly avoided addressing "the need for the *Sullivan* prophylaxis in cases of successive representation. Whether *Sullivan* should be extended to such cases remains, as far as the jurisprudence of this Court is concerned, an open question."

Mickens thus in some respects "called into question the integrity of the post-*Sullivan* superstructure constructed in [the] circuits." *Lombardo* v. *United States*, 222 F. Supp. 2d 1367, 1381 (S.D. Fla. 2002). But the lower courts have resolutely adhered to their pre-*Mickens* positions, no doubt because this Court's discussion of successive representation was dictum that did not even propose a resolution of the issue. The lower courts have, however, "predict[ed] that a Supreme

Court decision lingers on the horizon that expressly will limit the application of *Sullivan* in cases of successive representation." *Moss* v. *United States*, 323 F.3d 445, 462 (CA6 2003).

The law accordingly stands in a state of flux that would benefit considerably if this Court were in this case to resolve the issue it flagged in *Mickens*. In the Ninth Circuit, it remains "more difficult for a defendant to show that counsel actively represented conflicting interests in successive rather than simultaneous representation" (*United States* v. *Christakis*, 238 F.3d 1164, 1169 (2001)), a rule that raised the bar for petitioner to establish a violation of the Sixth Amendment.

On the other hand, subsequent to *Mickens*, the Sixth Circuit has held that the *Sullivan* presumption applies when (as in petitioner's case) the prior and current matters are "nearly identical." *Moss* v. *United States*, 323 F.3d 445, 462 (2003). The Fourth and Eighth Circuits have adhered to their precedents broadly applying *Sullivan* to all successive representation cases subsequent to *Mickens*. *United States* v. *Young*, 315 F.3d 911, 915 n.5 (CA8 2003); *Rubin* v. *Gee*, 292 F.3d 396, 408 (CA4), cert. denied, 123 S. Ct. 637 (2002). The Tenth Circuit also long ago rejected any effort to cabin *Sullivan* to cases of multiple representation as "inconsistent with our" prior Sixth Amendment precedents. *Church* v. *Sullivan*, 942 F.2d 1501, 1511 (1991).

The Sixth Circuit's rule that *Sullivan* applies when the subjects of the former and current representations are closely related is the correct one and should be adopted by this Court. As that court explained:

> While * * * there is a lesser likelihood of prejudice in traditional cases of successive representation, such as where the attorney is compelled to cross-examine a former client and the former representation bore only a "substantial relation" to the current proceedings, the probability of prejudice

> dramatically increases in circumstances where the attorney represented a co-defendant during the pre-indictment phase of the same proceeding. * * * This probability reaches near certainty where, as here, the attorney's former and current clients collaborate to mount a defense. This extreme likelihood of prejudice, and the corresponding difficulty in demonstrating that prejudice, warrant the application of *Sullivan* to the petitioners' claims.

Moss, 323 F.3d at 462. Moreover, as the Fifth Circuit has explained:

> Unlike competency of representation, where an attorney's conduct may fall anywhere along a continuum ranging from the incompetent to the superlative, conflict-laden representation is not susceptible of such fine gradations. Such representation is invidious, often escaping detection on review, and is tantamount to the denial of counsel itself.

Perillo v. *Johnson*, 205 F.3d 775, 806 n.13 (2000) (quoting *United States* v. *Alvarez*, 580 F.2d 1251, 1256-57 (CA5 1978)). See also *id.* ("[A] cold record may not reveal 'the erosion of zeal that may ensue from divided loyalty.'" (quoting *Castillo* v. *Estelle*, 504 F.2d 1243, 1245 (CA5 1974))); *Rubin* v. *Gee*, 292 F.3d 396, 402 (CA4) (Wilkinson, C.J.) ("When lawyers' conflicts of interest adversely affect their performance, it calls into question the reliability of the proceeding and represents a breakdown in the adversarial process fundamental to our system of justice."), cert. denied, 123 S. Ct. 637 (2002). This Court in *Strickland* v. *Washington* explained that there is "a fairly rigid rule of presumed prejudice for conflicts of interest" precisely because it "is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests." 466 U.S. 668, 696 (1984). Rigorous scrutiny of the detrimental consequences of attorney conflicts of interest is

essential to effectuating the Sixth Amendment right to counsel and to preserving confidence in the criminal justice system.

Certiorari accordingly should be granted to decide whether and to what extent the *Sullivan* presumption of prejudice applies in cases of successive representation.

II. Certiorari Should Be Granted To Resolve The Circuit Conflict Over The Proper Standard For Finding An "Adverse Effect" Sufficient To Establish A Sixth Amendment Violation Under *Sullivan*.

A. The lower courts are intractably divided.

Although this Court held twenty-three years ago in *Sullivan* held that a presumption that a conviction violates the Sixth Amendment arises when counsel operates under an "actual conflict" that has an "adverse effect" upon the representation (446 U.S. 335, 350 (1980)), those "are not self-defining phrases" (*United States* v. *Bowie*, 892 F.2d 1494, 1500 (CA10 1990)). This Court's explication of *Sullivan*'s "adverse effect" requirement has accordingly been criticized by the lower courts as "rather vague." *Beets* v. *Collins*, 65 F.3d 1258, 1265 (CA5 1995) (en banc). There is "no Supreme Court precedent, *but a split in circuit authority*, regarding the appropriate conflict of interest standard." *Quinones* v. *Miller*, No. 01 Civ 10752, 2003 U.S. Dist. LEXIS 9176, at *122 (S.D.N.Y. June 3, 2003) (magistrate judge's report and recommendation) (emphasis added). Indeed, in cases in which "*Cuyler* [v. *Sullivan*] controls," the state and federal courts have long

> been confused about the actual test to apply and thus have had difficulty applying it. Some courts have held that once an actual conflict is shown, ineffectiveness is also shown. Other courts have had difficulty distinguishing between adverse effect and prejudice; thus, once actual conflict is shown, these courts discuss whether the conflict prejudiced

> defendant's case. The third approach taken by courts holds that [*Sullivan*] requires proof of an actual conflict and then proof that the conflict had an adverse effect.

State v. *Jenkins*, 715 P.2d 716, 719 (Ariz. 1986) (citing *Parker* v. *Parratt*, 662 F.2d 479 (CA8 1981); *Brown* v. *State*, 275 S.E.2d 52 (Ga. 1981), overruled on other grounds, *Wilson* v. *Zant*, 290 S.E.2d 442 (Ga. 1982); *Commonwealth* v. *Michel*, 409 N.E.2d 1293 (Mass. 1980)).

In one camp stands a substantial majority of the courts of appeals: the First, Second, Third, Fifth, Sixth, and Tenth Circuits. Those courts hold that "a defense counsel's performance was adversely affected by an actual conflict of interest if a specific and seemingly valid or genuine alternative strategy or tactic was available to defense counsel, but it was inherently in conflict with his duties to others or to his own personal interests." See, *e.g.*, *Moss* v. *United States*, 323 F.3d 445, 466 (CA6 2003); *United States* v. *Burgos-Chaparro*, 309 F.3d 50, 53 (CA1 2002), cert. denied, 123 S. Ct. 922 (2003); *United States* v. *Armienti*, 313 F.3d 807, 811 (CA2 2002); *Duncan* v. *Morton*, 256 F.3d 189, 197 (CA3 2001); *Perillo* v. *Johnson*, 205 F.3d 775, 781 (CA5 2000); *Church* v. *Sullivan*, 942 F.2d 1501, 1512 (CA10 1991); *United States* v. *Rodriguez*, 929 F.2d 747, 751 (CA1 1991) (per curiam) (Breyer, C.J., on panel). This "is not a test that requires a defendant to show that the alternative strategy or tactic not adopted by a conflicted counsel was reasonable, that the lapse in representation affected the outcome of the trial, or even that, but for the conflict, counsel's conduct of the trial would have been different. Rather, it is enough to show that a conflict existed that 'was inherently in conflict with' a plausible line of defense or attack on the prosecution's case." *United States* v. *Malpiedi*, 62 F.3d 465, 469 (CA2 1995).

In another camp – applying an intermediate test – stand the Fourth and Eleventh Circuits. They apply the majority rule except that they reject the view that the asserted

alternative strategy or tactic need not even have been reasonable. The defendant must demonstrate "that a plausible alternative defense strategy existed that '[his] defense counsel might have pursued,' that this 'alternative strategy or tactic was objectively reasonable under the facts of the case known to the attorney at the time of the attorney's tactical decision,' and that 'the defense counsel's failure to pursue that strategy or tactic was linked to the actual conflict.'" *Rubin* v. *Gee*, 292 F.3d 396, 404 (CA4) (quoting *Mickens* v. *Taylor*, 240 F.3d 348, 361 (CA4 2001) (en banc), aff'd, 535 U.S. 162 (2002)), cert. denied, 123 S. Ct. 637 (2002); *Freund* v. *Butterworth*, 165 F.3d 839, 860 (CA11 1999).

The final camp – applying the minority test – includes the Seventh and Ninth Circuits. The Ninth Circuit held in this case that petitioner was required to establish that "counsel was influenced in his *basic strategic decisions* by the interests [of the former client], as where the conflict *prevents* an attorney * * * from arguing the relative involvement and culpability of his clients in order to minimize the culpability of one by emphasizing the other." Pet. App. 13a (citation omitted) (alteration in original) (emphasis added). Under the Ninth Circuit's minority view, "an adverse effect in the *Cuyler* sense must be one that *significantly worsens* counsel's representation." *United States* v. *Mett*, 65 F.3d 1531, 1535-36 (1995) (emphasis added). As the government argued below (see *supra*), that court avowedly interposes its adverse effect standard as a "*substantial hurdle*" to a claim under the Sixth Amendment. *Maiden* v. *Bunnell*, 35 F.3d 477, 481 (1994) (emphasis added).

The Seventh Circuit similarly finds a Sixth Amendment violation only if "the defense attorney was *required* to make a choice advancing his own interests to the detriment of his client's interests." *Stoia* v. *United States*, 22 F.3d 766, 771 (CA7 1994) (quoting *United States* v. *Ziegenhagen*, 890 F.2d 937, 939 (CA7 1989) (quoting, in turn, *United States* v. *Horton*, 845 F.2d 1414, 1419 (CA7 1988))). The "defendant has the burden of showing specific instances where counsel

could have and would have done something different." *Griffin* v. *Camp*, 40 F.3d 170, 173 (CA7 1994).

The conflict arises in part from the Ninth Circuit's basic misapprehension of this Court's precedents. The opinion below erroneously cites *Wheat* v. *United States*, 486 U.S. 153, 160 (1988), as requiring the defendant to prove that "counsel was influenced in his basic strategic decisions" and that the conflict "prevent[ed] [the] attorney" from vigorously defending the defendant by "arguing the relative involvement and culpability of his clients." Pet. App. 13a. *Wheat* applies no such test. Rather, the "basic strategic decisions" language actually appears in *Wood* v. *Georgia*, 450 U.S. 261, 272 (1981), in which the Court did not announce a Sixth Amendment standard but rather remanded because it could not "be sure whether counsel was influenced in his basic strategic decisions by the interests of the employer who hired him." The "prevents an attorney" language appears in *Wheat*, but is a quotation from *Holloway* v. *Arkansas*, 435 U.S. 475 (1978), which similarly did not adopt a Sixth Amendment standard but rather highlighted the great *dangers* that arise when an attorney is faced with fulfilling conflicting duties in the criminal context. The conflict may

> prevent an attorney from challenging the admission of evidence prejudicial to one client but perhaps favorable to another, or from arguing at the sentencing hearing the relative involvement and culpability of his clients in order to minimize the culpability of one by emphasizing that of another. Examples can be readily multiplied. The mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee when the advocate's conflicting obligations have effectively sealed his lips on crucial matters.

Id. at 490.

It is therefore not surprising that *no* other court of appeals has employed the Ninth Circuit's minority test in determining

whether a conflict of interest adversely affected the defendant's representation under *Sullivan*. To the contrary, subsequent to the Ninth Circuit's decision in this case, the Sixth Circuit acknowledged the "basic strategic decisions" formulation from this Court's decision in *Wood*, but reiterated that it joined the Second Circuit in holding that the defendant need show "only that some *plausible* alternative defense strategy or tactic *might* have been pursued." *Moss* v. *United States*, 323 F.3d 445, 466 (2003) (quoting *Amiel* v. *United States*, 209 F.3d 195, 199 (CA2 2000)) (emphases added). Similarly, the en banc Fourth Circuit in the *Mickens* decision subsequently affirmed by this Court acknowledged the "basic strategic decisions" formulation, but held that the defendant need only demonstrate a "plausible defense strategy," adding that the strategy must have been "reasonable under the facts of the case known to the attorney." *Mickens*, 240 F.3d at 360-61. The Fourth Circuit has also discussed this Court's statement that a conflict may "prevent the attorney" from vigorously representing a client, holding that a Sixth Amendment violation is established so long as the defendant shows there "was a plausible alternative defense strategy which was reasonable under the facts of the case and that the failure to pursue this strategy was linked to [the] conflict of interest." *Rubin*, 292 F.3d at 405 (quoting *Holloway*, *supra*).

As petitioner now shows, this case is an excellent vehicle to resolve this acknowledged three-way conflict.

B. The circuit split is outcome determinative in this case.

1. Petitioner's best hope for an acquittal in this case was the strategy that his counsel did not employ: an all-out, no-holds-barred attack on Swan, from the beginning of the trial through closing arguments. This attack would have had two prongs. First, during his opening statement and the first half of the trial, Schlie could have placed all of the blame for the bribery scheme on Swan and portrayed petitioner as the victim of Swan's duplicity. He could have delivered (but

critically did not) an opening argument that depicted Swan as someone who had repeatedly bribed stockbrokers prior to the Teletek merger and continued to do so long after petitioner left Teletek. He could have contrasted that portrayal with a description of petitioner as an honest businessman who had built Teletek and run the company lawfully, and whom Swan had merely used to fulfill his goal of obtaining a NASDAQ listing and then discarded shortly after the merger. Finally, in the opening statement and initial testimony, he could have challenged (but did not) Swan's veracity, outlining Swan's myriad lies to petitioner and others to conceal his bribery scheme.

By adopting an aggressive "blame Swan" strategy throughout the first half of trial, Schlie would have laid the foundation to continue the strategy through the second half of the trial, after Swan pleaded guilty and provided damaging testimony against petitioner as a government witness. During the second half of the trial, Schlie could have vigorously attacked Swan's credibility as a witness during his cross-examination and his closing argument, just as he did with another government witness (Annette Rosenberg) with whom he did not have an attorney-client relationship. Thus, Schlie could have aggressively cross-examined Swan regarding all of the lies that he had previously told to, *inter alios*, his wife, his close friend and former co-defendant Orton, petitioner, and even his attorneys. Further, he could have argued that Swan had lied to the jury to win a reduced sentence.

Schlie did none of these things. Indeed, there is no way he ethically could have. As even the Ninth Circuit acknowledged, "By shifting the blame to Swan through cross-examination concerning matters on which he had previously represented him, Schlie could have breached his duty of loyalty to Swan * * *." Pet. App. 13a. Petitioner's case was tried in Nevada, which applies the ABA Model Rules of Professional Conduct. See Nev. S. Ct. R. 150. Under Model Rule 1.9(a), "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the

same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation." Under Model Rule 1.9(c), with exceptions not relevant here, "A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter * * * use information relating to the representation to the disadvantage of the former client" or "reveal information relating to the representation."

Schlie and his former client Swan both would have potentially faced serious consequences had Schlie vigorously attacked Swan. An aggressive cross-examination of Swan would have disclosed Swan's prior false statements and highlighted the breadth of Swan's criminal activity. It would therefore have subjected Swan to perjury and obstruction of justice charges, as well as potential further bribery charges, and jeopardized his chances of obtaining a downward departure at sentencing. See Pet. App. 13a ("Effective testimony could have affected [Swan's] sentence through a substantial assistance departure. Conversely, if Swan lied on the stand, an obstruction of justice enhancement was a possibility."). By cross-examining Swan about his lies, Schlie also risked being forced into the role of a witness and, as a result, being disqualified as petitioner's trial counsel, thereby endangering the $160,000 fee – one of the largest that he received between 1996 and 1999 – paid to him by petitioner. And, as noted, Schlie would have faced disciplinary action by the Nevada bar.

Accordingly, although the court of appeals asserted that "Schlie carried out precisely the *type* of representation [petitioner] maintained that his trial attorney could not and did not provide because of his conflict," (Pet. App. 15a (emphasis added)), that is so (if at all) only in the sense that the Ninth Circuit sets an exceedingly high bar to demonstrating an adverse effect on counsel's representation. For example, the fact that Schlie sought to undermine Swan's

credibility by examining *other* witnesses (*id.* 15a), is no substitute for the more plausible strategy of attacking Swan directly. And the fact that Schlie supposedly *could have* attacked Swan with non-confidential materials (*id.* 16a) is no answer when Schlie in fact failed to do so.

2. In these circumstances, a clear majority of circuits would hold that the conflict of interest under which Schlie labored constituted an "adverse effect" under *Sullivan*. Aggressively attacking Swan's credibility throughout the trial manifestly was a "seemingly valid or genuine alternative strategy or tactic" that was "inherently in conflict with" (*United States* v. *Malpiedi*, 62 F.3d 465, 469 (CA2 1995)) Schlie's ongoing duties of loyalty and confidentiality to his former client. And this strategy was furthermore not merely "reasonable" (*Rubin* v. *Gee*, 292 F.3d 396, 401-02 (CA4), cert. denied, 123 S. Ct. 637 (2002)), but it undoubtedly was petitioner's greatest prospect for an acquittal.

In contrast to the Ninth Circuit's effort to cobble together from the trial transcript isolated instances in which Schlie did criticize Swan, courts applying the majority and intermediate rule recognize that "a cold record may not reveal the erosion of zeal that may ensue from divided loyalty," and the "*high impossible* task of making a meaningful qualitative analysis of trial counsel proficiency, in a case involving divided loyalties, from an examination of the transcript alone"; "[s]uch representation is invidious, often escaping detection on review, and is tantamount to the denial of counsel itself." *Perillo* v. *Johnson*, 205 F.3d 775, 806 n.13 (CA5 2000) (citing *Castillo* v. *Estelle*, 504 F.2d 1243, 1245 (CA5 1974); *Johnson* v. *Hopper*, 639 F.2d 236, 239 (CA5 1981); *United States* v. *Alvarez*, 580 F.2d 1251, 1256-57 (CA5 1978)). Thus, in *Church* v. *Sullivan*, 942 F.2d 1501, 1512 (CA10 1991) (quoting *Holloway* v. *Arkansas*, 435 U.S. 475, 489 (1978)), the Tenth Circuit held that "the mere fact that cross-examination might appear 'vigorous' does not necessarily expunge this aspect of the constitutional error. Rather, the dangers inherent in successive and multiple representations

do not become apparent merely by scrutinizing what the attorney did: 'representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing.'" The Eighth Circuit has expressly "agree[d] with" this conclusion in *Church* (*Dawan* v. *Lockhart*, 31 F.3d 718, 721 (1994)) and the Sixth Circuit has embraced *Church* as well (*Moss* v. *United States*, 323 F.3d 445 (2003)).

Those courts specifically recognize what the Ninth Circuit refused to acknowledge: that it is "difficult to envision circumstances more fraught with inherent conflict than where a lawyer must present a defense theory inculpating his former client, particularly where the former representation was factually intertwined with the criminal defendant's case." *United States* v. *Levy*, 25 F.3d 146, 151 (CA2 1994) (Newman, J.) (quoting *Church* v. *Sullivan*, 942 F.2d 1501, 1510-11 (CA10 1991)). "An attorney who cross-examines a former client inherently encounters divided loyalties. In these circumstances, counsel is placed in the equivocal position of having to cross-examine his own client as an adverse witness. His zeal in defense of his client the accused is thus counterpoised against solicitude for his client the witness." *Perillo* v. *Johnson*, 205 F.3d 775, 801-02 (CA5 2000) (citing *United States* v. *Voigt*, 89 F.3d 1050, 1078 (CA3 1996); *Lightbourne* v. *Dugger*, 829 F.2d 1012, 1023 (CA11 1987); *Stephens* v. *United States*, 595 F.2d 1066, 1070 (CA5 1979); *Castillo* v. *Estelle*, 504 F.2d 1243, 1245 (CA5 1974)). The Sixth Circuit thus recently recognized that "the probability of prejudice *dramatically increases* in circumstances where the attorney represented a co-defendant during the pre-indictment phase of the same proceeding. This probability reaches *near certainty* where, as here, the attorney's former and current clients collaborate to mount a defense." *Moss* v. *United States*, 323 F.3d 445, 462 (2003) (emphases added). See also *id.* (describing the "extreme likelihood of prejudice").

The "adverse effect" from a conflicting former representation is at its apex in a case like this one: where the

attorney is not merely called upon to examine the former client to whom the attorney owes duties of loyalty and confidentiality, but where the best prospect for the current client's acquittal is to *blame the former client*. A "strategy of shifting blame to one's codefendants is a legitimate and often effective defense strategy." *United States* v. *Mers*, 701 F.2d 1321, 1330 (CA11 1983). As this Court explained in a related context, "[i]n conspiracy cases, where the liberal rules of evidence and the wide latitude accorded the prosecution may, and sometimes do, operate unfairly against an individual defendant, it is *especially important* that he be given the benefit of the undivided assistance of his counsel * * *." *Glasser* v. *United States*, 315 U.S. 60, 76 (1942) (emphases added). *E.g.*, *United States* v. *Levy*, 25 F.3d 146, 156 (CA2 1994) (Newman, J.) (finding adverse effect when counsel "still possessed privileged information from his relationship with [former client] that was directly relevant to [current client's] defense. [Counsel's] continuing legal and ethical obligations to protect [former client] and his confidences necessarily meant that [counsel's] interests diverged from [current client's], especially since [current client's] most likely defense was to shift blame to [former client]"); *United States* v. *Romero*, 780 F.2d 981, 986 (CA11 1986) (defendant's "status as a low level employee made a shifting blame defense extremely feasible and * * * such a defense was completely foreclosed to him because it would have implicated his codefendant and another client of his attorney").

Schlie, however, was inescapably precluded from vigorously attacking Swan. Indeed, as noted, he entirely failed to do so in the opening statement or the first half of the trial, and only barely challenged Swan later in the case, no doubt because to do so would have been profoundly unethical. Swan would have been subject to criminal charges, and Schlie would have lost an enormous fee and been subject to disciplinary action. Courts applying the majority and intermediate rules find an "adverse effect" when, as in this

case, a viable strategy "would have highlighted the exposure of his former client, [Swan], to a perjury charge." *Dawan* v. *Lockhart*, 31 F.3d 718, 721 (CA8 1994). The lawyer in that circumstance must "choose between undermining the work product resulting from his prior representation * * * by exposing [the former client] to perjury charges and vigorously pursuing the impeachment of [the former client]." *Perillo* v. *Johnson*, 205 F.3d 775, 803 (CA5 2000). Similarly, other circuits hold that an adverse effect exists when (as in this case) aggressive cross-examination would involve the attorney "exposing himself to being called as a witness." *United States* v. *Levy*, 25 F.3d 146, 158 (CA2 1994). The Second Circuit thus found a Sixth Amendment violation when the attorney could have appeared as an adverse witness against the former client, who (as in this case) was a central witness and whose "credibility was essential to [the present client's] conviction." *United States* v. *Amorkliti*, 156 F.3d 150, 157 (1998).[3]

3. The contrary result that would be reached on these facts in circuits applying the majority or intermediate rule is best illustrated by *United States* v. *Malpiedi*, 62 F.3d 465 (CA2 1995). In that case, the Second Circuit considered a defendant's claim that his trial counsel had rendered constitutionally ineffective assistance because he had

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[3] The Ninth Circuit's assertion that Schlie was powerless to use privileged information against Swan only serves to highlight the conflict of interest. That view also conflicts with a recent decision of the highest court of the State of Maryland. In *Lettley* v. *State*, 746 A.2d 392, 402 (2000), the "State argue[d], and the trial judge ruled, that because counsel was ethically forbidden to use the confessing client's confidential information in defense of Appellant, and because no other lawyer would have had access to that confidential information, there was no conflict of interest." The Court "disagree[d]. The conflict is inherent in the divided loyalties. It mattered little that new counsel would not be privy to the confidential information known to Appellant's counsel; a conflict nonetheless existed."

previously represented an important government witness during an appearance before the grand jury that indicted the defendant. During that appearance, in which she testified as a custodian of records, the witness had falsely claimed that she did not recognize the defendant's handwriting, and she did not mention any tampering with the documents by the defendant. At trial, however, the witness testified that she saw the defendant altering documents. When defense counsel's cross-examination of the witness broached the topic of her first grand jury testimony in order to impeach her, the trial judge raised the issue of the witness's attorney-client privilege, and defense counsel eventually agreed to forgo cross-examination regarding the appearance.

After his conviction, the defendant filed a motion for a new trial on the basis of his trial attorney's conflict. Based on a series of findings, the trial judge denied the motion. The judge found that the trial attorney's testimony at the post-trial evidentiary hearing was "totally credible" and thus accepted the attorney's testimony that his decision not to cross-examine the witness about her first grand jury appearance was purely strategic. The judge also determined that the defendant had not been adversely affected by his attorney's conflict of interest, because his attorney's cross-examination of the witness was "over all, very effective" (62 F.3d at 468); the attorney was able to indirectly establish the inconsistency between the witness's grand jury and trial testimony (*id.*); the attorney impeached the witness with other, stronger evidence (*id.* at 468-69); and the attorney "established that [the witness] had lied in the second grand jury proceeding, rendering her lies in the first proceeding cumulative for purposes of impeaching her credibility" (*id.* at 469).

On appeal, the Second Circuit reversed. First, it found an actual conflict of interest because "[i]t was * * * in [the defendant's] best interest to have his attorney conduct a thorough, no-holds-barred cross-examination of" the government witness, but he was unable to cross-examine the witness regarding her first grand jury appearance "because of

his obligations as her prior attorney and her invocation of the attorney client privilege." 62 F.3d at 469.

The court of appeals emphasized that "'once the defendant establishes that there was an actual conflict, he need not prove prejudice, but simply that a "lapse in representation" resulted from the conflict.'" 62 F.3d at 469 (quoting *United States* v. *Iorizzo*, 786 F.2d 52, 58 (CA2 1986)). "To prove a lapse in representation," the panel explained, "a defendant must 'demonstrate that some plausible alternative defense strategy might have been pursued, and that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests.'" *Id.* (quoting *United States* v. *Levy*, 25 F.3d 146, 157 (CA2 1994) (internal quotations omitted)). The court continued:

> This is not a test that requires a defendant to show that the alternative strategy or tactic not adopted by conflicted counsel was reasonable, that the lapse in representation affected the outcome of the trial, or even that, but for the conflict, counsel's conduct of the trial would have been different. Rather, it is enough to show that a conflict existed that "was inherently in conflict with" a plausible line of defense or attack on the prosecution's case. Once such a showing is made, *Strickland*'s "fairly rigid" presumption of prejudice applies.

Id.

Applying its two-part test to the facts before it, the court of appeals concluded that the conflict of interest of the defendant's trial counsel had caused a "lapse of representation" and thus adversely affected his representation of the defendant: "Cross-examination of [the witness] about testimony at her first grand jury appearance was a tactic that was entirely plausible but barred by [the attorney's] conflict of interest. * * * The foregone opportunity involved cross-examination regarding not only [the witness's] failure to give

the grand jury the damaging testimony she offered at trial, but also her perjury regarding [the defendant's] handwriting." *Id.* at 470.

Under the two-part test outlined by the Second Circuit in *Malpiedi*, petitioner unquestionably would have been entitled to a new trial because his trial counsel's actual conflict of interest caused a "lapse of representation" and thus adversely affected his representation of petitioner. Specifically, as even the Ninth Circuit acknowledged in petitioner's case, petitioner had a plausible alternative defense strategy – "laying the blame on Swan and portraying himself as the victim" (Pet. App. 13a) in a no-holds-barred, all-out assault on Swan throughout the trial – that might have been, but was not, pursued. That strategy was inherently in conflict with Schlie's duties to his former client, Swan; again, as the Ninth Circuit itself acknowledged, "[b]y shifting the blame to Swan through cross-examination concerning matters on which he had previously represented him, Schlie could have breached his duty of loyalty to Swan * * *." (*id.*). Equally significantly, as reflected in the panel's decision, an all-out, "blame Swan" strategy was neither "so insubstantial that even the most ardent and talented, conflict-free advocate would likely have avoided it" nor "so clearly against the defendant's interest that unconflicted counsel would never pursue it."[4]

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[4] The Seventh Circuit has embraced the *Malpiedi* analysis. In *Enoch* v. *Gramley*, 70 F.3d 1490, 1497 (1995), cert. denied, 519 U.S. 829 (1996), the Seventh Circuit endorsed *Malpiedi* as "a good example of what is meant by a substantial and particular relationship between the allegedly conflicting instances of representation." In *Malpiedi*, "the lawyer likely learned particular confidential information during his representation of her [in the grand jury proceedings] that tended to exculpate the defendant, or that was at least pertinent to impeaching her during the defendant's trial." *Id.*

Certiorari should be granted to resolve the three-way circuit split over the test for finding an "adverse effect" under *Cuyler* v. *Sullivan*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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